Supreme Court, U.S.
FILED
DEC 30 2009
OFFICE OF THE CLERK

150 (1)

09-798

No. ____

In The
Supreme Court of the United States

NIRANJAN LAL,

Petitioner,

v.

UNITED STATES LIFE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

RONALD W. RYAN
Counsel of Record
LEWIS REED & ALLEN PC
136 E. MICHIGAN AVENUE
SUITE 800
KALAMAZOO, MI 49007
(269) 553-1424

Attorney for Petitioner

December 30, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

In as much as an injunctive-stay order has the effect of preserving the last, uncontested status preceding commencement of the controversy, the *status quo ante litem*, whether the 6th Circuit Court of Appeals, in a 2-1 decision, departed from this well settled legal doctrine causing Dr. Lal to suffer a gross misapplication of justice when it overlooked this axiomatic legal doctrine and ruled on the matter as if the *status quo* was not preserved.

PARTIES

Petitioner Dr. Niranjan Lal is a disabled physician suffering from chronic pancreatitis. He is the insured and the Plaintiff in the underlying action.

Respondent, United States Life Insurance Company provides long term disability insurance to physicians through the American Medical Association, and is the insurer and the defendant in the underlying action.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

STATEMENT OF THE CASE 1

I. Background Facts and Issues 1

II. Decision of the District Court 3

III. Decision of the 6th Circuit 5

REASONS FOR GRANTING THE PETITION ... 6

1. The 6th Circuit failed to recognize and apply the well settled doctrine that an injunctive-stay order preserves the "last, uncontested status preceding commencement of the controversy." 7

CONCLUSION 10

APPENDIX

Appendix A: Sixth Circuit Opinion, dated September 3, 2009 ..... 1a

Appendix B: District Court Judgment, dated August 2, 2007 ..... 11a

Appendix C: District Court Opinion, dated July 12, 2007 ..... 13a

Appendix D: District Court Opinion, dated December 7, 2006 ..... 36a

Appendix E: District Court Order, dated December 7, 2006 ..... 49a

TABLE OF AUTHORITIES

Cases

Blaylock v. Checker Oil Co.,
547 F.2d 962 (6th Cir. 1976) 4, 5, 9

District 50 United Mine Workers v. Int'l Union,
412 F.2d 165 (1969) 9

Doster v. Estes,
337 N.W.2d 549 (1983) 4, 8

Fall v. Copperweld Speciality Steel Co.,
380 F. Supp. 1277 (N.D. Ohio 1974) 9

Gilley v. United States,
649 F.2d 449 (6th Cir. 1981) 4, 8

Tanner Motor Livery, Ltd. v. Avis, Inc.,
316 F.2d 804 (9th Cir. 1963), *cert. denied*, 375
U.S. 821, 84 S.Ct. 59, 11 L.Ed.2d 55 (1963) ... 9

Washington Capitols Basketball Club, Inc. v. Barry,
419 F.2d 472 (9th Cir. 1969) 9

Statutes

28 U.S.C. § 1254(1) 1

Rules

1 Am. Jur. 2d *Actions* § 68 (2006) 4, 8

Other

Black's Law Dictionary, 1267 (5th ed. 1988) 7

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App 1a) (Nos. 07-2009, 07-2055) is unpublished, but unofficially reported at 2009 WL 2840736. The opinion and order of the United States District Court for the Western District of Michigan (App. 11a) (No. 05-0853) is unpublished, but unofficially reported at 2007 WL 2046812. The opinion and order of the United States District Court for the Western District of Michigan, (App 36a and 49a) No. 1:05-CV-853 (W.D. Mich. December 7, 2006) denying summary judgment is unpublished, but unofficially reported at 2006 WL 3542670.

BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on September 3, 2009. Application for extension of time within which to file a petition for a writ of certiorari was presented to Justice Stevens, who on December 8, 2009 extended the time to and including January 1, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Background Facts and Issues

On August 31, 1983, Niranjan Lal, M.D. purchased a disability insurance policy through the American Medical Association. (App. 15a). On February 4, 2003, he became disabled, with chronic pancreatitis and its complications. (App. 25a). On February 16, 2003, his medical license was suspended for a period of six months and one day. (App. 45a) On September 5,

2003, he made a claim for disability benefits. (App. 16a)

In response to his claim for insurance benefits, defendant United States Life took the position the policy had terminated on March 31, 1997 when an Order of Summary Suspension was served upon Dr. Lal, and denied the claim. (App. 37a)

Attention needs to be drawn to the Order of Summary Suspension and the Stay Order delaying its effect issued by the Kalamazoo County Circuit Court. The order of summary suspension was received by Dr. Lal, on March 31, 1997, and summarily suspended Dr. Lal's license to practice medicine "commencing the date this order is served upon [Lal]." (App. 37a). However, on the very day he received it from the State of Michigan, Dr. Lal took the Order to his attorney, Curtis Bell, who then obtained a stay order from the Kalamazoo County Circuit Court, Honorable John Foley. (App. 37a). U.S. Life asserted that Dr. Lal's license was suspended when it was received on March 31, 1997, if only for a few hours between the time of its receipt and the time that the stay was entered.

In the District Court's opinion on summary judgment, Judge Quist found that due to Judge Foley's stay order, there was no effective suspension of Dr. Lal's license to practice medicine. (App. 42a). The District Court further took judicial notice of the Michigan Department of Community Health's "Verify a License/Registration" website which, reports that Dr. Lal's license was suspended on February 16, 2003 and reinstated October 9, 2003. (App. 45a) and therefore determined as a matter of law that the license was

suspended on February 16, 2003 and the policy of insurance terminated on that date.

II. Decision of the District Court

Prior to trial before Honorable David M. Lawson, the parties filed cross motions for summary judgment before Honorable Gordon J. Quist (to whom the matter was assigned before being transferred) on the issue of the policy's termination date. (App. 16a).

The policy language in question provides:

> A person's insurance will end on the earliest of:
>
> 6. Upon the suspension or revocation in any state of his license to practice medicine as a result of a criminal act, ethical violation, or gross malpractice; or upon his surrender of his license to practice medicine in any state prior to, during, or in lieu of any medical licensure board inquiry, investigation or other action pertaining to a criminal act, ethical violation, or gross malpractice. (App. 37a)

District Court Judge Quist held that the Michigan Circuit Court's (Judge Foley's) stay order "undid the summary suspension [order] and restored the *status quo ante,* and Dr. Lal's license was not suspended – and coverage did not terminate – until February 16, 2003." (App. 16a).

Judge Quist pointed out that although the policy terminates "upon the suspension" of Dr. Lal's medical

license, the circuit court's stay acted to "preserve the status quo existing on the date of its issuance.", quoting 1 Am. Jur. 2d *Actions* § 68 (2006). (App. 41a). Three opinions were also relied upon by Judge Quist regarding the effect of a stay order in Michigan jurisprudence:

> *See Gilley v. United States,* 649 F.2d 449, 453 (6th Cir. 1981) (noting that stays of administrative agency actions are granted by courts "to maintain the status quo" pending further review of the agency's action); *Doster v. Estes,* 126 Mich. App. 497, 508, 337 N.W.2d 549, 554 (1983) (stating that the purpose of injunctive relief is "to preserve the status quo" pending trial or administrative appeal). The status quo in injunctive procedures is the "last, uncontested status preceding commencement of the controversy." *Blaylock v. Checker Oil Co.,* 547 F.2d 962, 965 (6th Cir. 1976). (App. 41a)

Judge Quist reasoned that "the circuit court's stay was issued on March 31, 1997, and was effective immediately. The stay preserved the status quo so that Lal's license was not suspended pursuant to the Order of Summary Suspension. Therefore, because Lal's license was not suspended on March 31, 1997, the Policy did not terminate on this date." (App. 42a)

Because the license was not suspended, the termination clause in the policy was not triggered and the matter was transferred to Judge Lawson who tried the issue of whether Dr. Lal became disabled prior to February 16, 2003 (App. 16a). Judge Lawson found that Dr. Lal met the definition of totally disabled from his increasingly severe symptoms of chronic

pancreatitis before February 16, 2003, and that defendant U.S. Life had breached its contract of disability insurance with Dr. Lal. (App. 32a).

III. Decision of the 6th Circuit

In a 2-1 decision, the Court of Appeals reversed District Court Judge Quist, finding that a suspension of license (the triggering event for the termination of insurance coverage) occurred the moment when Dr. Lal was served with the order. (App. 5a). The majority of the Court held that the 1997 suspension of Lal's license, though short-lived, was sufficient to trigger the termination clause in the contract and therefore required judgment for U.S. Life. (App. 5a) The majority reasoned, "nothing in the language suggests that an extremely short period of suspension is not sufficient to trigger termination." (App. 6a).

The dissenting opinion would have affirmed the holding of Judge Quist; that the circuit court's order staying the order of summary suspension operated to preserve the status quo, "the last, uncontested status preceding commencement of the controversy" and cited the *Blaylock* 547 F.2d 962, 965 decision; and that Dr. Lal's license was not effectively suspended on March 31, 1997. (App. 8a-9a) Moreover, the dissenter found that it was not clear that Dr. Lal's license was suspended on March 31, 1997, even for a brief period of time. (App. 10a)

Further, the dissenter found that the order of summary suspension commenced **the date** the order was served and it did not state, "upon service." (App. 10a) (Emphasis added). Since a "court of competent jurisdiction" stayed the order the same day it was

served, even by the terms of the orders, it was unclear whether Dr. Lal's license was ever suspended in 1997. (App. 10a).

Lastly, as a consequence of the stay order which, was to preserve and maintain the status quo so that the license was not suspended pursuant to the order of summary suspension, the dissenter recognized as did the district judge that the license continued to be in effect until it was suspended on February 16, 2003. (App. 10a).

REASONS FOR GRANTING THE PETITION

The 6th Circuit Court of Appeals, in its split decision has committed legal error by failing to recognize and apply well settled law regarding the application of a Stay order: that the stay operates to maintain the *status quo ante litem*, before there was any legal conflict. In this matter, the status quo before the issuance of the order of suspension was that Dr. Lal had his license to practice medicine; Dr Lal was not suspended from the practice of medicine and his insurance policy was still intact. Instead the 6th Circuit held that the license was suspended immediately upon receipt; and that Dr. Lal was suspended (and therefore his policy was terminated) if only for a matter of hours. There was no basis for such a conclusion especially, as pointed out in the dissenter's opinion, the times of the receipt of the order of suspension and stay order were not recorded. Those times are not even in evidence. Because of this error at law, Dr. Lal has suffered substantial harm. He relied upon the policy of disability insurance to provide wage continuation benefits through age 75. As of the date of the District Court's Order of July 12, 2007, the

district court determined that damages were accrued in excess of $130,000.00, plus prejudgment interest; not an insignificant sum. (App. 34a) Certiorari should be granted in this matter to correct the substantial error of law apparent on the record which adversely affects Dr. Lal's material rights.

1. **The 6th Circuit failed to recognize and apply the well settled doctrine that an injunctive-stay order preserves the "last, uncontested status preceding commencement of the controversy."**

In 1997 Kalamazoo County Circuit Court issued a Stay Order enjoining the summary suspension of license that was received by Dr. Lal. *Black's Law Dictionary*, Fifth Addition, page 1267 defines "Stay" as,

> **Stay.** A stopping; the act of arresting a judicial proceeding by the order of a court . . . a stay is a suspension of the case or some designated proceeding within it. It is a kind of injunction with which a court freezes its proceedings at a particular point. It can be used to stop the prosecution of the action all-together, or to hold up only some phase of it, such as the execution about to be levied on a judgment.

The result of the Kalamazoo County Circuit Court's Stay Order enjoining the Board of Medicine's Summary Suspension was that Dr. Lal was not suspended.

> "A stay of an action is a postponement of proceedings in the case until the happening of a

> particular event. The issuance of a stay halts all progress of the action, and no additional step may be taken until the stay is removed. At stay operates merely to preserve the status quo existing on the date of its issuance, and in no way addresses the merits of the parties' dispute." 1 Am Jur 2d, *Actions,* §75.

Indeed the effect of the Stay Order was that Dr. Lal was able to practice the arts and sciences of medicine in the State of Michigan pursuant to his license on the day before its receipt, March 30, 1997, the day of its receipt, March 31, 1997, and the day after, April 1, 1997, and thereafter until the suspension occurred six years later on February 16, 2003. District Court Judge Quist correctly found that there existed no genuine issue of material fact that the policy did not terminate because there was no suspension of license. (App. 42a.) Moreover the district court was correct to take judicial notice of the date of suspension reported by the State of Michigan: February 16, 2003. (App. 45a)

In support of its position, the district court summarized Michigan jurisprudence and the effect of an injunctive-stay. In *Gilley v. United States,* 649 F.2d 449, 453 (6th Cir. 1981) the court noted that stays of administrative agency actions are granted by courts "to maintain the status quo" pending further review of the agency's action.

In *Doster v. Estes,* 337 N.W.2d 549, 554 (1983) the Michigan Court of Appeals stated that the purpose of injunctive relief is "to preserve the status quo" pending trial or administrative appeal.

More to the point, the status quo in injunctive procedures is the "last, uncontested status preceding commencement of the controversy." *Blaylock v. Checker Oil Co.*, 547 F.2d 962, 965 (6th Cir. 1976), citing *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472 (9th Cir. 1969); *District 50 United Mine Workers v. International Union*, 412 F.2d 165 (1969); *Fall v. Copperweld Speciality Steel Co.*, 380 F. Supp. 1277 (N.D. Ohio 1974).

A review of the doctrine reveals that it has national acceptance. In *Washington Capitols, supra,* the Ninth Circuit quoted *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-809 (9th Cir. 1963), *cert. denied*, 375 U.S. 821, 84 S.Ct. 59, 11 L.Ed.2d 55 (1963): "The function of a preliminary injunction is to maintain the status quo ante litem pending a determination of the action on the merits. The status quo is the last, uncontested status preceding the commencement of the controversy . . . It is therefore necessary to examine what constituted the last, uncontested status of the parties." The last uncontested status was that Dr. Lal possessed a license to practice medicine. The stay preserved the status quo so that Dr. Lal's license was not suspended pursuant to the order of summary suspension. Judge Quist was correct in holding that because Dr. Lal's was not suspended on March 31, 1997, "the Policy did not terminate on this date." (App. 42a).

At the 6th Circuit, the dissenter took issue with the lack of evidence relied upon by the majority, who concluded that the license was suspended between the time of the service of the order of suspension and the moment the circuit court issued its stay order. The exact times of the service and entry of the order of the

stay are not recorded and are not in evidence. The dissenter correctly concluded that, "even by the terms of the orders (the order of summary suspension and the stay order), it is unclear whether Lal's license was ever suspended." (App. 10a) This is especially true (as pointed out by the dissenter) given the fact that the order of suspension stated that it took effect "commencing on **the date** [the] order was served" rather than, "upon service." (App. 10a) (Emphasis added).

Were the 6th circuit's opinion permitted to stand, Dr. Lal would be denied insurance benefits based upon facts not in evidence (the time of the receipt of the order of suspension and the time of the entry of the stay order), and contrary to well settled doctrine that the stay preserved the *status quo ante litem* where Dr. Lal was licensed and therefore insured.

CONCLUSION

For all of the reasons set forth above, Niranjan Lal, M.D. respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

RONALD W. RYAN
Counsel of Record
LEWIS REED & ALLEN PC
136 E. MICHIGAN AVE
SUITE 800
KALAMAZOO, MI 49007
269-553-1424

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 07-2009, 07-2055

[Filed September 3, 2009]

NIRANJAN LAL,	)
	)
Plaintiff-Appellee Cross-Appellant,	)
	)
v.	)
	)
UNITED STATES LIFE INSURANCE COMPANY,	)
	)
	)
Defendant-Appellant Cross-Appellee.	)
	)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN

BEFORE: MERRITT, ROGERS, AND WHITE, Circuit Judges.

ROGERS, Circuit Judge. Niranjan Lal obtained a judgment that U.S. Life wrongfully refused to pay

him disability benefits under an insurance contract. U.S. Life appeals, claiming that coverage under the contract terminated when Michigan briefly suspended Lal's license to practice medicine several years before the onset of Lal's disability. Because that conclusion is required by the most natural reading of the contract, judgment for Lal was not warranted.

I.

Lal, a nephrologist (kidney doctor), is a citizen of Michigan. U.S. Life is a New York corporation with principal place of business in New York. Lal's membership in the AMA made him eligible for a disability insurance policy underwritten by U.S. Life, under which coverage began in 1983. The insurance policy required U.S. Life to pay income replacement benefits if Lal became disabled while the policy was in force.

The policy provided that coverage would end "upon the suspension or revocation in any state of [Lal's] license to practice medicine as a result of a criminal act, ethical violation, or gross malpractice . . . ." The insurance contract also stated that it was governed by Illinois law.

In April 1996, Michigan police received a tip that Lal might be wrongfully prescribing painkillers. Throughout the remainder of 1996 an undercover officer posed as a patient and repeatedly requested that Lal give him prescriptions for Vicodin. By the time Lal finally refused to continue prescribing Vicodin for the undercover officer in December, Lal had written prescriptions for a total of 500 Vicodin pills, notwithstanding statements from the undercover

officer such as that the officer "just wanted to get some more Vicodin," that his pain was gone but he "just liked having [the Vicodin] around," and even that the officer was selling the drug for $5 per pill.

On March 27, 1997, Michigan's Department of Consumer & Industry Services, Board of Medicine and Disciplinary Subcommittee ordered that Lal's license to practice medicine in Michigan be summarily suspended. The order was to take effect "commencing the date [it was] served upon" Lal. Shortly after service of the order on March 31, Lal petitioned for and received an order from the county circuit court that stayed the suspension order subject to limits on Lal's ability to prescribe narcotics.

Michigan pursued criminal charges, and eventually obtained a jury verdict against Lal for "three counts of delivery of a prescription form" and a sentence of eighteen months of probation. The conviction occurred in March ,1999; the Michigan Court of Appeals affirmed in November 2000.

After Lal's conviction, the Michigan medical regulatory establishment conducted various administrative proceedings. Eventually, on January 17, 2003, the Michigan Board of Medicine Disciplinary Subcommittee issued an order that fined Lal $5000 and suspended his license to practice medicine for six months and one day, effective 30 days after the order was signed. This suspension took effect on February 16, 2003. The medical licensing board restored Lal's license on October 9, 2003.

Meanwhile, Lal's chronic pancreatitis worsened. Serious attacks sent him to hospital emergency rooms

in 1999, 2000, and 2001. Lal testified that his pancreatitis was under control from 2001 until early 2003. But in January 2003 his condition took a turn for the worse, and at the beginning of February his condition became so bad that he ceased working. Lal's physician found that Lal was disabled from practicing medicine as of February 4, 2003.

Lal filed for disability benefits under his insurance contract with U.S. Life. U.S. Life concluded that coverage had terminated because of the 1997 suspension and refused to pay, though it did refund the premiums Lal had paid for coverage since 1997.

Lal filed a two-count complaint against U.S. Life in Michigan court. Lal claimed that U.S. Life breached the insurance contract by withholding payment for his valid claim of disability and that its failure to pay violated Michigan's Uniform Trade Practices Act. U.S. Life removed in December 2005. In December 2006, the district court denied U.S. Life's motion for summary judgment and found that as a matter of law Lal's license to practice medicine was first suspended so as to terminate the insurance contract on February 16, 2003, rather than in 1997.

The district court conducted a bench trial in June 2007. The court concluded that Lal became unable to work as a physician as of February 4, 2003. The court further found that U.S. Life breached its contract because Lal met all necessary conditions under the policy, including that he was under the regular care of a physician for his disability. The court held that U.S. Life was not liable under the Michigan Uniform Trade Practice Act because, under then-governing precedent, claims "reasonably in dispute" were not subject to the

12% interest penalty provided by that Act for late payment.

Lal appeals, claiming that a subsequent change in Michigan law requires that he receive a 12% interest rate on his judgment. U.S. Life also appeals, claiming that Lal was not under the regular care of a physician for his disability as the contract requires, and that the contract terminated in 1997 when Michigan suspended Lal's license. The last issue is dispositive.

II.

The 1997 suspension of Lal's license, though short-lived, was sufficient to trigger the termination clause in the contract and thus requires judgment for U.S. Life.

The contract term at issue provides that coverage ends "upon the suspension or revocation in any state of [Lal's] license to practice medicine as a result of a criminal act, ethical violation, or gross malpractice . . . ."

The 1997 suspension went into effect after Lal received service of the order of summary suspension on March 31, 1997. Later that day, the state circuit court entered an order:

> Ex Parte Order Staying the Order of Summary Suspension
>
> This matter having come before the Court on a Petition for Ex Parte Order to Stay the Order of Summary Suspension and the Court having

> been fully advised in the premises, IT IS HEREBY ORDERED as follows:
>
> The Order of Summary Suspension filed in the above captioned matter on March 27, 1997, bearing Complaint Number 43 97 0316 00 is hereby stayed until *April 14, 1997 at 1:30 p.m. hearing on this petition. Petitioner shall not prescribe any narcotic or pain medicine.* [italicized material handwritten]

All further proceedings until 2003 did not result in the suspension of Lal's license. Such proceedings as occurred in other agencies do not shed light on the legal reasoning behind the circuit court order.

The unambiguous language of the contract said that Lal's contract terminated once his license was suspended for ethical violations. Nothing in the language suggests that an extremely short period of suspension is not sufficient to trigger termination.

Lal does not argue that the contract language is ambiguous, though if the language were ambiguous it would be interpreted in his favor. *See Aurelius v. State Farm Fire & Cas. Co.*, 894 N.E.2d 765, 769 (Ill. App. Ct. 2008). Rather, Lal argues that the language is unambiguous in his favor. But Lal's claim that the state merely "took action" to suspend his license in 1997 rather than "suspending" it cannot be reconciled with the unambiguous meaning of those terms, particularly given that the contract refers to both suspension and revocation. Lal's argument implies that only revocation would terminate coverage, a position not reconcilable with the language of the contract.

Lal argues that the provision should be read as not immediately terminating coverage if the state suspends a license wrongfully or without legal justification. But whether or not such a liberal reading is warranted, in this case Lal had committed ethical and criminal violations before the 1997 suspension. The only thing that suggests that the 1997 suspension was improper is the state court's stay of that suspension—but that court did not provide its reasoning in staying the suspension, and the record as a whole provides no reason to conclude that the state acted wrongfully by suspending Lal's license in 1997.

In refusing U.S. Life's motion for summary judgment below, the district court evidently concluded that the state court stayed the suspension nunc pro tunc, effectively "unsuspending" Lal retroactively for the few hours between the suspension taking effect and the entry of the stay. But the order did not explicitly say that it acted retroactively and gave no reason to assume that it so acted. Even if the court were to have issued its order with the intent of retroactively shielding any unlicensed practice of medicine Lal may have committed on March 31, it is hardly clear that the court could ex parte reinstate Lal's coverage with U.S. Life in contravention of the terms of his contract.

Because coverage terminated once the state suspended Lal's license, the district court should have granted summary judgment to U.S. Life. The remaining issues raised on appeal and cross-appeal are therefore moot.

III.

For these reasons, we reverse the judgment of the district court.

WHITE, Circuit Judge, dissenting. I respectfully dissent, and would affirm.

The order of summary suspension ordered that Lal's license to practice medicine in Michigan "shall be and hereby is summarily suspended commencing the date this order is served upon Respondent." The order was served on Lal on March 31, 1997. On that same day, a circuit court stayed the order until it could hold a hearing. On April 7, the court entered an amended order staying the order of summary suspension until after hearing and decision by the administrative agency. On July 30, an Administrative Hearing Officer signed a stipulated order lifting the order of summary suspension and restricting Lal's authority to prescribe and dispense narcotic medication, pending a final determination by the Disciplinary authority. The July 30 order was amended on August 28. The Board of Medicine Disciplinary Subcommittee entered its Final Order on January 17, 2003, suspending Lal's license for six months and one day. The order stated "this order shall be effective 30 days from the date" of signing.

On the basis of these facts, the district judge concluded that the circuit court's order staying the order of summary suspension operated to preserve the status quo, "the last, uncontested status preceding commencement of the controversy[,]" *Lal v. United States Life Ins. Co.*, No. 1:05-CV-853, 2006 WL 3542670, at *3 (W.D. Mich. Dec. 7, 2006), citing

Blaylock v. Cheker Oil Co., 547 F.2d 962, 965 (6th Cir. 1976), and that Lal's license was not effectively suspended on March 31, 1997. Thus, the court concluded, the policy remained in effect until February 16, 2003, the effective date of the suspension. The majority rejects this reasoning, concluding instead that Lal's license was suspended from the time the order of summary suspension was served until the stay order was entered, and that this suspension triggered the termination clause. I would affirm the district court.

The policy states:

TERMINATION - Date Insurance Ends

Your insurance will end on the earliest of:

1. the date the group policy ends;
2. the end of the period for which the last premium has been paid by you;
3. the date you retire;
4. the certificate anniversary coinciding with or next following the date you attain age 75;
5. the date you cease to be an Eligible Member and not Actively at Work;
6. upon the suspension or revocation in any state of your license to practice medicine as a result of a criminal act, ethical violation, or gross malpractice; or upon your surrender of your license to practice medicine in any state prior to, during, or in lieu of any medical licensure board inquiry, investigation or other action pertaining to a criminal act, ethical violation, or gross malpractice.

Although the terms "actively at work" and "retired" are defined by the policy, "suspension" and "revocation" are not. Nevertheless, all the terminating events contemplate either that the policy expires or that the insured is no longer covered due to age or inactivity. It is not clear that Lal's license was suspended on March 31, 1997, even for a brief period of time.

Although the policy does not use the term "final suspension," it also does not use the term "take action to suspend." The term "suspension" connotes that one's privilege to practice has been abrogated or withheld. Had the Board of Medicine decided on a lesser sanction in its Final Order, one could certainly have debated whether Lal's license was ever suspended at all under the policy.

The order of summary suspension stated that Lal's license would be suspended "commencing the date [the] order is served;" it did not state "upon service." A court of competent jurisdiction stayed the order the same date it was served. Thus, even by the terms of the orders, it is unclear whether Lal's license was ever suspended. The district court concluded that the effect of the stay was to preserve "the *status quo* so that Lal's license was not suspended pursuant to the Order of Summary Suspension." *Lal*, 2006 WL 3542670, at *3. Given the timing of the orders, this was a sound conclusion. While the Board of Medicine took action to summarily suspend Lal's license, that action was stayed by the court. Notwithstanding the order of summary suspension, as a consequence of the circuit court's order, Lal's license continued to be in effect until it was suspended on February 16, 2003. I would affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 05-0853

[Filed August 2, 2007]

NIRANJAN LAL,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES LIFE INSURANCE COMPANY,	)
	)
	)
Defendant.	)
	)

Honorable David M. Lawson

JUDGMENT

Pursuant to the Court's Opinion dated July 12, 2007 and the parties' stipulation filed July 27, 2007,

It is **ORDERED AND ADJUDGED** that the plaintiff, Niranjan Lal, shall recover from the defendant, United States Life Insurance Company, in the amount of One Hundred Thirty Thousand,

Thirty-Four Dollars and Twenty Cents ($130,034.20), plus prejudgment interest of Nine Thousand, Four Hundred Thirty-One Dollars and Thirty-Four Cents ($9,431.34), for a total of One Hundred Thirty-Nine Thousand, Four Hundred Sixty-Five Dollars and Fifty-Four Cents ($139,465.54).

It is further **ORDERED, ADJUDGED, AND DECLARED** that the defendant shall continue making payments to the plaintiff in accordance with the terms of the AMA Group Policy G-189,553, certificate number 2313963.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: August 2, 2007

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 05-0853

[Filed July 12, 2007]

NIRANJAN LAL,

Plaintiff,

v.

UNITED STATES LIFE INSURANCE COMPANY,

Defendant.

Honorable David M. Lawson

OPINION

The plaintiff, Niranjan Lal, a medical doctor, brought an action against the defendant, United States Life Insurance Company (US Life), for breach of a disability insurance policy the defendant issued on a group basis through the American Medical Association. The complaint, originally filed in state court, alleges one count of breach of contract and one

count of violation of the Michigan Uniform Trade Practices Act. The case was removed to federal court, and the matter proceeded to trial on June 5, 2006. Two witnesses testified in open court and three witnesses testified by deposition, and 15 exhibits were received in evidence. The following constitutes the Court's findings of fact under Federal Rule of Civil Procedure 52, followed by its application of the governing law.

I. Jurisdiction

The plaintiff alleges a claim under state law. The plaintiff is a citizen of the State of Michigan and the defendant is a New York corporation with its principal place of business in the State of New York. The amount in controversy exceeds the sum of $75,000 exclusive of costs and attorney fees. The Court has jurisdiction of the claims based on diversity of citizenship. 28 U.S.C. §§ 1332, 1441.

II. Findings of Fact

Plaintiff Niranjan Lal is a physician who has practiced medicine in Kalamazoo, Michigan since 1975. He is board certified in internal medicine with a subspecialty in nephrology and hypertension disorders. He has suffered from chronic calcific pancreatitis since the early 1970s, and his symptoms have waxed and waned over the years.

Lal is a member of the American Medical Association (AMA). The AMA offered a group disability policy to its members, which is underwritten by defendant US Life. Lal was issued a certificate of coverage under AMA Group Policy G-189,553. Lal's

certificate number 2313963 became effective on August 31, 1983.

The policy states that US Life will pay income replacement benefits to an insured person who becomes totally disabled while the insurance coverage is in force, following an elimination period. Def.'s Ex. 5 at 28. The policy states that coverage ends (among other reasons)

> upon the suspension or revocation in any state of your license to practice medicine as a result of a criminal act, ethical violation, or gross malpractice; or upon your surrender of your license to practice medicine in any state prior to, during, or in lieu of any medical licensure board inquiry, investigation or other action pertaining to a criminal act, ethical violation, or gross malpractice.

Id. at 27. In 1997, the Board of Medicine Disciplinary Subcommittee of the Michigan Department of Consumer & Industry Services filed an administrative complaint against Dr. Lal for writing prescriptions to dispense narcotic drugs absent a lawful therapeutic purpose, and it issued an order of summary suspension of his license to practice medicine on March 27, 1997, which became effective when it was served on Dr. Lal on March 31, 1997. That suspension was stayed the same day by the Kalamazoo County, Michigan circuit court. Lal was convicted of criminal charges stemming from this complaint on March 17, 1999. The State of Michigan issued a final order suspending Dr. Lal's license to practice medicine for six months plus one day on January 17, 2003, which became effective on February 16, 2003. His license was restored by an

order of the medical licensing board on October 9, 2003.

Dr. Lal filed a claim for disability benefits under the US Life policy on September 5, 2003 alleging that he was totally disabled from his increasingly severe symptoms of chronic pancreatitis as of February 4, 2003. US Life denied the claim in part because it believed that coverage terminated under the terms of the policy when the State of Michigan issued its order of summary suspension in 1997, well before the alleged onset of disability. The parties filed cross motions for summary judgment on the issue of the policy's termination date, and on December 7, 2006, the Honorable Gordon J. Quist, to whom this case was assigned before it was transferred to the undersigned, held that the Michigan circuit court's stay order undid the summary suspension and restored the *status quo ante*, and Dr. Lal's license was not suspended – and coverage did not terminate – until February 16, 2003. The issue presented for trial, therefore, is whether Dr. Lal became "disabled" as that term is defined in US Life's policy prior to February 16, 2003.

The policy contains the following definition of "total disability":

> TOTALLY DISABLED or TOTAL DISABILITY means:
> . . . your complete inability to perform the substantial and material duties of your Current Occupation, and not engaged in any other occupation.
> . . .
> The Total Disability must be a result of an Injury or Sickness and must begin while

> insured under the group policy. To be considered totally disabled, you must also be under the Regular Care and Attendance of an Attending Physician.
>
> REGULAR CARE AND ATTENDANCE means observation and treatment to the extent necessary under existing standards of medical practice for the condition causing Disability.

Def.'s Ex. 5 at 28.

The plaintiff contends that he met the definition of disability while coverage was in effect because the symptoms of his chronic pancreatitis became exacerbated to the point where he had to take narcotic pain medication, which rendered him unable to practice medicine, and he had been seeing Dr. Michelle Anderson for this condition since the fall of 2001 and was under her care. The defendant argues that Dr. Lal was not so sick that he could not practice his medical specialty, and he was not under the regular care of a physician for his chronic pancreatitis because there was a lengthy hiatus in his treatment with Dr. Anderson, whom he did not see after the alleged disability onset date until March 25, 2003.

Dr. Lal testified at trial that after graduating medical school in India, he came to the United States for a his residency in Detroit and completed a fellowship in nephrology in Miami, Florida in 1973. He said that his practice treating kidney ailments and hypertension typically involved office visits and hospital rounds, although he concentrated his work more on hypertension disorders for the last ten years of his practice. His typical day started at the hospital

in the morning, followed by office visits beginning at approximately 10:00 a.m., and he saw patients throughout the day and into the evening.

Pancreatitis apparently has been a recurring problem for Dr. Lal all his life. He stated that when he was young he had serious bouts every three to six months that rendered him bedridden for three to four days. These attacks were triggered by certain foods, which he learned to avoid. He was first diagnosed with pancreatitis in 1973 when he was on his fellowship in Miami. He was admitted to a hospital where an endoscopic procedure – known as an endoscopic retrograde cholangiopancreatography (ERCP) – was performed to open the common bile duct. In 1976, he was admitted to a hospital in Boston where another ERCP was performed, and he had a ten-day hospital stay. Apparently there were complications associated with that procedure.

Dr. Lal testified that he managed his chronic pancreatitis before 1973 without the help of medications, and afterward he took some drugs as needed for pain, plus bed rest and alteration of his diet. When an attack recurs – which happens at unpredictable times – his symptoms include intractable stomach pain, left-sided headache, numbness in arms and legs, nausea, and vomiting. Currently he takes a variety of medications to assist in digestion and control of pain. He says that he has been taking Vicodin daily for pain since February 2003. His pancreatitis has caused other complications, which now include diabetes diagnosed about ten years ago and diabetic neuropathy diagnosed about three years ago.

In 1999, 2000, and 2001, Dr. Lal suffered attacks that sent him to the emergency room at hospitals in North Carolina and western Michigan. He was given pain medication, including Vicodin, and sent home. He testified that his symptoms worsened in 2000, when he decided to seek treatment from Dr. Michelle Anderson, a pancreas specialist at the University of Michigan hospitals. Dr. Anderson saw him in 2001 two or three times and ordered medical tests. She changed his medication regime and added some additional pain medications. Sometime in 2001, Dr. Lal found that the side-effects of his medications caused drowsiness and fatigue, and he found it necessary to cut back on his practice to part time. He continued to work part time for almost two years before he stopped practicing medicine on February 4, 2003.

He last saw Dr. Anderson before he stopped working in September 2001; she had prescribed medications with prescription refills, which he says he continued to take. He was also seeing an internist, Dr. Liselle Douyon, since 2000. Dr. Douyon was managing the plaintiff's diabetes, which Dr. Anderson described as a complication of his chronic pancreatitis. He did not return to Dr. Anderson until March 2003, he says, because his chronic pancreatitis was under control during that time.

Dr. Lal testified that his fatigue began to worsen in January 2003. He said he had trouble even walking from his car to his office, and he asked his wife to start driving him to work. In the beginning of February 2003, he stayed home, cancelled his office appointments (as shown by his office calendar), took more pain medication, including Tylenol and Vicodin, and put himself on a liquid diet. He anticipated

returning to work the following week, but he was unable. He said that to control the pain, he would start with Tylenol, then take Vicodin when the non-narcotic proved ineffective; but he found himself taking the narcotic drug one to three times each day.

The plaintiff also called to make an appointment with Dr. Anderson that month, but he found that her schedule would not allow him to be seen until March 25, 2003, when he did see her. Dr. Lal said he took the first appointment he could get. He also made an appointment with his internist, Dr. Douyon.

Dr. Lal acknowledged that in January 2003, he was notified that administrative proceedings that had been pending since 1997 were concluding with the result that his medical license would be suspended. He said that he believed he could obtain an extension on the commencement date of the suspension through April, but it was not to be. Dr. Lal also acknowledges that he did not tell Dr. Anderson of his licensure troubles in March 2003 when he saw her; he explains that he believed that he might win reconsideration, but was not told of the denial until April of that year.

The plaintiff explained that he did not apply for disability benefits under his policy with US Life until September 5, 2003 because he believed his condition would improve and he could return to work. However, due to complications from the pancreatitis, he underwent another ERCP in August and had his gall bladder removed.

Dr. Lal testified that he is unable to practice medicine because of the symptoms and effects of his chronic pancreatitis complicated by the side-effects of

his pain medication. He says he feels pain, drowsiness, fatigue, and "fuzziness in the head"; he must take Bentyl, Pamelor, and Vicodin to help absorb nutrients, compensate for his pancreatic insufficiency, and control his pain. The medications then cause more drowsiness and fatigue. He has been receiving benefits from two other disability insurance companies and the Social Security Administration, but he says that he received more income working part time than from all these alternate sources combined.

Dr. Anderson testified that her prescription orders generally did not permit refills after one year. Dr. Lal maintained that he continued to take medications prescribed by Dr. Anderson beyond the one-year anniversary of his last visit with her in September 2001. The prescription records in the claim file indicate that Dr. Lal obtained refills of medications that ostensibly are intended to treat pancreatitis through March 6, 2003, Def.'s Ex. 5 at 251, although it is unclear who was the prescribing physician, and the plaintiff apparently continued to visit Dr. Douyon during this time. Dr. Lal insisted that he never self-prescribed any medication, and there is no credible contrary evidence.

Dr. Michelle Anderson testified that she first saw the plaintiff in November 2000 and began treating him for chronic pancreatitis. She recommended an ERCP, which Dr. Lal declined; started a course of medical therapy; and recommended a three-month return visit. Dr. Lal next returned to see Dr. Anderson in March 2001. She examined him, adjusted his medications, and recommended that he return in six months. She also suggested he obtain some medical tests for pancreatic cancer before his next visit. He complied,

and returned next in September 2001. Dr. Anderson noted at that time that the plaintiff had been under her care for almost a year, his symptoms during that time had waxed and waned, and he had of late been doing reasonable well until he succumbed to "dietary indiscretions." She recommended he consider an ERCP and continue his medications. She also recommended that he return in three months.

However, as noted above, the plaintiff did not see Dr. Anderson again until March 25, 2003. She remarked that she was surprised that he had waited so long before returning. Nonetheless, she testified that he was still under her care and stated that her clinic's policy is that a lapse in treatment of three years generally is required before a returning patient is considered "new." She explained that she routinely sees patients on three- and six-month recalls, and if they are stable she schedules return visits for a year. When pressed, Dr. Anderson testified that a 1-½-year gap in treatment is "pretty close" to interrupting her regular care of a patient. But she maintained that Dr. Lal was under her regular care when he returned to see her in March 2003 and she considered him to be her patient for the entire period.

Dr. Anderson also explained that she will not prescribe medications for patients she had not seen for a year. However, she also confirmed that she writes prescriptions for non-narcotic medications, including pain medication, with refills that will last for a year that the patient could continue to take beyond the one-year period.

The plaintiff's pancreatitis is well documented. He had physical findings on imaging studies that showed

scarring, which Dr. Anderson referred to as calcifications. She explained that the pancreas sits on top of the celiac plexus, which is a bundle of nerve tissue, and when the pancreas becomes inflamed it causes excruciating abdominal pain. Pain also is caused by dilation of the pancreatic duct. In addition, gall stones that obstruct the common bile duct can prevent drainage of the pancreatic duct and cause pain. In Dr. Lal's case, imaging studies from the spring of 2003 showed gallstones in the gall bladder, stones in the bile duct, dilation in the pancreatic duct, and possibly stones in the pancreatic duct as well. Later that year, Dr. Lal underwent another ERCP and had his gallbladder removed.

Dr. Anderson found that Dr. Lal was disabled from practicing medicine as of February 4, 2003 when he stopped working due to pain from his chronic pancreatitis that required him to take narcotic pain medication. She said that use of narcotic drugs impairs a physician's ability to make good judgments. She did not believe that there was any work he could do as a physician given his condition. Dr. Anderson acknowledged that she was not informed of Dr. Lal's licensing difficulties when she made her initial statement to US Life representatives that his disability onset date was February 4, 2003. However, she was aware of all the circumstances when she testified in her trial deposition, and she did not change her opinion. She noted that the plaintiff contacted her office sometime in mid-February 2003 or earlier to schedule a return visit and he came as soon as her schedule permitted.

Dr. Mark Friedman, the defendant's expert, was quite suspicious of the plaintiff's claim of disability and

believed that his complaints of disabling pain are referable to secondary gain. Dr. Friedman is board certified in internal medicine, practices medicine half-time, and devotes the remainder of his professional time to conducting record reviews for insurance companies and state agencies in disability cases. He did not examine the plaintiff in this case but he did review his medical records and read Dr. Anderson's discovery deposition. He said that in treating chronic pancreatitis, usually a primary care physician would work with a subspecialist in pancreatic diseases, which apparently was the relationship between Dr. Douyon and Dr. Anderson in this case. He believed that the 1-½-year treatment gap disqualified the plaintiff from claiming that he was under the "regular care" of Dr. Anderson within the meaning of the insurance policy in this case. He also believed that a person claiming disability due to pain might be able to perform sedentary work. Although he acknowledged that taking Vicodin might impair the plaintiff from working as a physician – he said it is a "tricky question" – he believed that Vicodin does not cause impairment when taken in an appropriate amount.

Dr. Friedman concluded that Dr. Lal's use of narcotic pain medication is not disabling. His opinion is tinged with skepticism arising from Dr. Lal's licensing problems coupled with the plaintiff's failure to disclose them to Dr. Anderson in March 2003. He discounts Dr. Anderson's opinion because it was based on limited information, that is, lack of knowledge of the license suspension. He also testified that she incorrectly accepted the history Dr. Lal gave to her about the disability onset date, and he believes that she could not accurately project the plaintiff's

condition back over the seven weeks from the March 25, 2003 visit to when he stopped working. Dr. Friedman also criticizes Dr. Anderson for finding that the plaintiff is disabled from a chronic condition after seeing him only one time. He believed that chronic pancreatitis is a disease that "burns itself out" so that it is "a bit of a leap of the imagination" to conclude that it can be permanently disabling. Friedman dep. at 70.

The defendant's other witnesses – Laura Parker and George Ashmore – testified to the claims-handling procedures and their interpretation of the policy conditions. Neither had any direct contact with the plaintiff, and they were not involved with the case until after the initial denial of the claim.

The Court concludes that the plaintiff became unable to perform work as a physician as of February 4, 2003. There is no dispute that he stopped working as of that date: he cancelled his appointments with patients that had been scheduled and has not returned to practice medicine since. The cessation of his practice at that time was not due to the suspension of his license, which was still in force and has since been restored.

The Court finds the plaintiff's complaints of disabling pain to be fully credible. He had a well-documented history of chronic calcific pancreatitis, and the pain he described is consistent with the symptoms Dr. Anderson stated were typical of the disease. In addition, objective medical tests showed that the plaintiff had developed gallstones and obstructions that would cause the pain he described. There is no evidence in this case that the formulation of gallstones is an event that happens suddenly, and it

is likely that the physical findings reported by Dr. Anderson at the March 25, 2003 examination had existed from the time that the plaintiff reported an increase in the severity of his pain that caused him to begin taking narcotic pain medication that he had on hand from previous prescriptions and discontinue working. Dr. Lal also eventually underwent two invasive procedures to address these problems. One, a third ERCP, was a procedure with which he had a prior bad experience and put off in favor of more conservative care, which suggests to the Court that his condition had worsened to the point that he had to turn to therapy that he earlier tried to avoid. That conduct does not support an inference that he was overstating his pain symptoms.

Dr. Friedman did not believe that ingestion of Vicodin would disable Dr. Lal from performing his duties as a physician. However, Dr. Friedman qualified his opinion with the statement that a patient must take the drug in a "reasonable amount" to relieve pain. He expressed the view that it is the reason one takes narcotic pain medication (i.e whether one takes the medication to "get high" or to alleviate pain), not the effect of the medication, that causes disability. That opinion makes little sense, however, when one considers the patient who must take large doses of pain medication to address his individual symptoms. The outcome manifested by physical reaction to the medication is the same regardless of the motive. And the determination of a "reasonable amount" of pain medication for legitimate therapeutic purposes is difficult to make without an examination of the patient.

The Court does not share Dr. Friedman's skepticism of the plaintiff's complaints of disabling pain. Dr. Lal's license suspension was not a career-ending event. He testified that the income he would receive from his disability insurance policy, even when combined with other disability income he is receiving, would not exceed his earnings from his part-time medical practice. This evidence stands uncontradicted in the record. Dr. Lal also testified that he enjoyed practicing medicine, and it is not reasonable to infer that he is exaggerating his pain symptoms for the purpose of recovering on his disability policy. The Court also rejects Dr. Friedman's criticism of Dr. Anderson's opinions. When Dr. Anderson gave her trial deposition, she had complete records and was fully informed of the plaintiff's social and personal history. She had been treating the patient since November 2001 and had the benefit of physically examining him, which Dr. Friedman had not. She is more qualified than Dr. Friedman to discuss the symptoms, treatment, and progression of pancreatic disease, and she had the benefit of a longitudinal picture of the patient's condition informed by personal contact with the plaintiff, which Dr. Friedman lacked. She also had no financial interest in testifying or expressing her opinion.

The Court, therefore, accepts Dr. Anderson's testimony as to the plaintiff's physical condition, rejects Dr. Friedman's testimony, and finds that the plaintiff was unable to perform the substantial and material duties of any gainful job as a physician as of February 4, 2003 due to chronic pancreatitis.

III. Conclusions of Law

A. Liability

The insurance policy states that it "is issued in and governed by the laws of Illinois." Def.'s Ex. 5 at 2. The parties agree that Illinois law supplies the rules for decision on the breach of contract claim. Under Illinois law, disability insurance policies "are subject to the same rules of construction applicable to other types of contracts." *Morgan v. CUNA Mut. Ins. Soc'y*, 242 Ill. App. 3d 1027, 1028-29, 611 N.E.2d 112, 114 (1993) (citing *Int'l Minerals and Chem. Corp. v. Liberty Mut. Ins. Co.*, 168 Ill. App. 3d 361, 119 Ill. Dec. 96, 522 N.E.2d 758 (1988)). Therefore, unambiguous terms need not be construed, *Becker v. Country Mut. Ins. Co.*, 158 Ill. App. 3d 63, 110 Ill. Dec. 285, 510 N.E.2d 1316 (1987), and the words in the policy are to be given their ordinary meaning. *Northbrook Nat'l Ins. Co. v. Nehoc Adver. Serv., Inc.*, 196 Ill. App. 3d 448, 143 Ill. Dec. 316, 554 N.E.2d 251 (1989).

In order to recover benefits, an insured must comply with the contractual limitations and requirements. *Smagala v. Owen*, 307 Ill. App. 3d 213, 218, 717 N.E.2d 491, 496 (1999). In this case, the requirements in the insurance policy issued by US Life for recovering income replacement benefits are that the policy is in force, the claimant becomes completely unable to perform the substantial and material obligations of his current occupation, the disability is due to a sickness or injury that began while the insurance was in force, and the claimant is under the care and attendance of an attending physician.

According to Judge Quist's opinion adjudicating cross motions for summary judgment, the insurance policy was in force from 1983 through February 16, 2003. The Court has found as a matter of fact that the plaintiff could not perform the duties of his job as a physician due to chronic pancreatitis as of February 4, 2003. The remaining question is whether the plaintiff was under "the Regular Care and Attendance of an Attending Physician." Def.'s Ex. 5 at 10.

The policy states:

> REGULAR CARE AND ATTENDANCE means observation and treatment under existing standards of medical practice for the condition causing Disability.

Ibid. The parties do not dispute that Dr. Anderson met the policy definition of attending physician. It also appear to be uncontested that Dr. Lal was under Dr. Anderson's regular care in the 2000 through 2001 time frame, and after March 25, 2003. Dr. Anderson testified that her care was continuous for the whole period. Dr. Friedman believed that treatment was interrupted.

In *Heller v. Equitable Life Assur. Soc'y of U.S.*, 833 F.2d 1253 (7th Cir. 1987), the court, applying Illinois law, considered a similar requirement in a physician's disability policy. The issue was whether the plaintiff, an invasive cardiologist who suffered from carpal tunnel syndrom, was required to undergo elective surgery in order to meet a policy condition that stated, "the total disability will not be considered to exist for any period during which the Insured is not under the regular care and attendance of a physician." *Heller*,

833 F.2d at 1255. The court held that the language did not require the insured to submit to surgery or any other particular course of treatment recommended by his doctor. The court explained:

> We are convinced that under Illinois law the clause "under the regular care and attendance" means just what it says, namely, that the insured is obligated to periodically consult and be examined by his or her treating physician at intervals to be determined by the physician. Clearly the language does not condition disability payments on the insured's undergoing surgery if recommended by the physician rendering "regular care and [in] attendance." We refuse to indulge in judicial activism and condition coverage under the contract on the insured's undergoing surgery, when the insurer failed to provide such a conditional clause in the policy.
>
> The clause, "under the regular care and attendance of a physician," was not intended to allow the insurer to scrutinize, determine, and direct the method of treatment the claimant receives. We are convinced that the purpose of the clause requiring the insured to be "under the regular care and attendance of a physician" is to determine that the claimant is actually disabled, *see, e.g., Russell v. Prudential Insurance Company of America*, 437 F.2d 602, 607 (5th Cir. 1971), is not malingering, and to prevent fraudulent claims.

Id. at 1257.

Applying the reasoning set forth above, it is apparent that the plaintiff was under the regular care and attendance of Dr. Anderson for his chronic pancreatitis from November 2000 through the present date (Dr. Anderson testified in her trial deposition that she had most recently seen the plaintiff on April 27, 2007). The policy in this case makes reference to "existing standards of medical practice" when considering regular care and attendance. Although Dr. Anderson would have preferred that Dr. Lal undergo an ERCP procedure sooner than he did, and that he visit her more frequently, she believed that under prevailing professional norms he was her patient throughout the course of treatment beginning in November 2000, and he was under her regular care. Dr. Anderson made the point in her testimony that since she puts stable patients on a one-year recall, Dr. Lal arguably missed only one visit under her regime. That rationale may strain the facts, especially since her office note from September 7, 2001 states that she wanted to see him again in three months. But that does not diminish the fact that the plaintiff turned to Dr. Anderson for care and treatment of his pancreatic disease, and she found him to be under her regular care according to existing medical practice standards.

Moreover, the purpose of this qualifying clause has been met in this case. The plaintiff saw Dr. Anderson for his sickness both before and after the disability onset date; his chronic pancreatitis was a genuine condition, as confirmed by Dr. Anderson; his ailment was confirmed by objective testing; and it cannot be said that he attempted to advance a fraudulent claim, as evidenced by Dr. Anderson's findings.

The Court finds that all the necessary conditions under the disability policy have been met by Dr. Lal. The failure to pay benefits constitutes a breach of the insurance contract for which the defendant must answer in damages.

The plaintiff also claims that the defendant is liable under the Michigan Uniform Trade Practices Act. The relevant statutes state:

> (1) A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance . . . or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice *unless the claim is reasonably in dispute.*
>
> . . .
>
> (4) If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance.

Mich. Comp. Laws § 500.2006(1), (4) (emphasis added). In order for the plaintiff to recover under this statute, he must prove that his claim was not "reasonably in dispute." *Fed. Ins. Co. v. Hartford Steam Boiler*

Inspection and Ins. Co., 415 F.3d 487, 499 (6th Cir. 2005). "'The purpose of the penalty interest statute is to penalize insurers for dilatory practices in settling meritorious claims, not to compensate a plaintiff for delay in recovering benefits to which the plaintiff is ultimately determined to be entitled.'" *Ibid.* (quoting *Arco Indus. Corp. v. Am. Motorists Ins. Co.*, 233 Mich. App. 143, 148, 594 N.W.2d 74 (1998)).

In this case, the defendant denied the claim because it believed that Dr. Lal's disability policy terminated when the State issued an order of summary suspension in 1997. At that time, the defendant refunded to the plaintiff the premium payments he had made after the license suspension date, even though the suspension was stayed. The Court believes that the issue of the defendant's liability for the claim was reasonably in dispute until Judge Quist decided the matter in December of last year. After that, there still existed a fact question whether Dr. Lal was totally disabled within the terms of the policy, including whether he was under the regular and attendance of a physician at the time. The Court finds that those issues were reasonably in dispute as well. *See All Am. Life and Cas. Co. v. Oceanic Trade Alliance Council Int'l, Inc.*, 756 F.2d 474, 481-82 (6th Cir. 1985).

The Court concludes, therefore, that the plaintiff has not sustained his burden of proof on count two of the complaint brought under the Michigan Uniform Trade Practices Act.

B. Damages

The parties agree that if the defendant is liable under the policy, it is obliged to pay a monthly benefit to the plaintiff of $3,000 beginning 90 days after the disability onset date. The elimination period prescribed by the policy is 90 days. The disability date is February 4, 2003. Payments should have been made starting May 4, 2003. Fifty monthly payments are due and owing from May 4, 2003 through the present date, totaling $150,000.

The defendant also refunded premiums from March 27, 1997 to February 16, 2003 totaling $19,965.80. The plaintiff agrees that this amount should be offset against the payments due under the policy.

The plaintiff also is entitled to prejudgment interest under Michigan Compiled Laws section 600.6013. The amount of interest must be determined based on the applicable interest rate, *see* Mich. Comp. Laws § 600.6013(8), applied to the amount owing, which changes month by month. The plaintiff is not entitled to penalty interest for the reasons stated earlier.

V. Conclusion

After consideration of the evidence, the parties' arguments, and the applicable law, and based on the findings of fact contained herein, the Court finds that defendant US Life has breached its disability insurance contract with the plaintiff. The Court also finds that the defendant did not violate the Michigan Uniform Trade Practices Act. The Court also finds that the plaintiff suffered damages in the amount of

$150,000 through the present date, and the defendant is entitled to a set off of $19,965.80.

Accordingly, it is **ORDERED** that the plaintiff may have judgment against the defendant, US Life Insurance Co., in the amount of $130,034.20, plus prejudgment interest.

It is further **ORDERED** that the plaintiff is entitled to a declaration that he is entitled to future payments in accordance with the terms of AMA Group Policy G-189,553 and certificate number 2313963.

It is further **ORDERED** that the parties shall submit their calculations of the amount of prejudgment interest they claim should be awarded on or before **July 20, 2007**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: July 12, 2007

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
MICHIGAN SOUTHERN DIVISION

Case No. 1:05-CV-0853

[Filed December 7, 2006]

NIRANJAN LAL, M.D.,

Plaintiff,

v.

UNITED STATES LIFE INSURANCE COMPANY,

Defendant.

HON. GORDON J. QUIST

OPINION

Plaintiff, Niranjan Lal, M.D. ("Lal"), filed a complaint against Defendant, United States Life Insurance Company ("U.S. Life"), in state court, alleging a breach of insurance contract. U.S. Life removed the case to this Court based on diversity jurisdiction. Now before the Court are Lal's motion for partial summary judgment and U.S. Life's motion for

summary judgment. For the following reasons, the Court finds that Lal was suspended as of February 16, 2003, and will deny the parties' motions for summary judgment

I. Background

Lal is a physician in the State of Michigan. U.S. Life is a New York corporation doing business in Michigan. Lal purchased a disability insurance policy ("Policy") with U.S. Life in 1983, through the American Medical Association, based on his status as a licensed physician. The Policy provided, in part, that:

> Your insurance will end on the earliest of:
>
> . . .
>
> 6. upon the suspension or revocation in any state of your license to practice medicine as a result of a criminal act, ethical violation, or gross malpractice; or upon your surrender of your license to practice medicine in any state prior to, during, or in lieu of any medical licensure board inquiry, investigation or other action pertaining to a criminal act, ethical violation, or gross malpractice.

On March 27, 1997, the Department of Consumer & Industry Services, Board of Medicine and Disciplinary Subcommittee ("Board") summarily suspended Lal's license to practice medicine "commencing the date this order is served upon [Lal]." It is undisputed that Lal was served with the suspension order on March 31, 1997. After being served, and on the same day, Lal obtained a stay of the Order of Summary Suspension in Michigan circuit court. (Lal Dep. at 11-12; Def.'s Br.

in Supp. Mot. Summ. J. and in Opp. to Pl.'s Mot. Summ. J., Ex. F.)

On April 7, 1997, the Michigan circuit court extended the stay of the Order of Summary Suspension. The Order of Summary Suspension was lifted by the circuit court on August 28, 1997, pursuant to a stipulation agreed to by the parties on July 15, 1997. On March 17, 1999, Lal was convicted of the prescription drug charges related to the summary suspension.

On January 17, 2003, the Board issued its "Final Order":

> IT IS HEREBY ORDERED that for violation . . . of the Public Health Code, supra, Respondent's license to practice medicine in the State of Michigan is SUSPENDED FOR A PERIOD OF SIX MONTHS AND ONE DAY commencing on the effective date of this Order.
>
> * * *
>
> IT IS FURTHER ORDERED that this Order shall be effective 30 days from the date signed by the Disciplinary Subcommittee's Chairperson or authorized representative, as set forth below.

The Order was signed on January 17, 2003. Thus, the suspension would be effective on February 16, 2003. The Board sent Lal a letter informing him of the opportunity to ask for reconsideration and to have an additional 30 days added to the period before the commencement of the suspension. Lal requested that the Board reconsider the suspension, but it declined to

do so and informed him of this decision on April 22, 2003.

Lal visited his physician, Michelle Anderson, on March 25, 2003, regarding his chronic calcific pancreatitis. Lal had previously been treated by Dr. Anderson for this condition in 2001. Dr. Anderson's report noted that Lal had a long history with this illness and that she "was shocked to see that I had not seen him for approximately 1-1/2 years." (Pl.'s Resp. to Def.'s Mot. Summ. J., Ex. J.) The report stated that Lal "has gotten progressively worse" since the last visit. Lal also informed Dr. Anderson that he had not worked since February 4, 2003, due to the worsening condition.

Lal applied for long term disability benefits for his chronic pancreatitis pursuant to the Policy on September 5, 2003. As part of the claim, he submitted a medical report from Dr. Anderson as well as a letter from Dr. Anderson in which she stated that Lal was totally disabled as of February 4, 2003. U.S. Life denied his claim, finding that his policy was terminated on March 27, 1997, when the Board suspended his medical license. Following several unsuccessful appeals to U.S. Life, Lal filed this complaint.

II. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Material facts are facts which are defined by substantive law and are necessary to apply the law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

248, 106 S. Ct. 2505, 2510 (1986). A dispute is genuine if a reasonable jury could return judgment for the non-moving party. *Id.* The court must draw all inferences in a light most favorable to the non-moving party, but may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

III. Discussion

A. The Policy's termination date.

When construing the terms of a contract, a court "shall give the language contained within the policy its ordinary and plain meaning so that technical and strained constructions are avoided." *Michigan Township Participating Plan v. Pavolich*, 232 Mich. App. 378, 383, 591 N.W.2d 325, 328 (1998). Where an insurance policy is clear, a court is "bound by the specific language set forth in the agreement." *Id.* at 382, 591 N.W.2d at 328 (citing *Heniser v. Frankenmuth Mut. Ins. Co.*, 449 Mich. 155, 160, 534 N.W.2d 502, 504 (1995)).

According to the terms of the Policy, it terminated "upon the suspension" of Lal's medical license by the Board. Thus, the parties dispute the date that Lal's license was suspended. U.S. Life contends that the Policy terminated on March 31, 1997, when the Order of Summary Suspension was served upon Lal and,

hence, became effective.[1] Lal, however, argues that the circuit court's stay of the summary suspension prevented the effectuation of the suspension.

U.S. Life contends that before Lal could obtain a stay of the suspension, he first had to have notice of the suspension. Lal himself stated that he first was served with the Order of Summary Suspension, then faxed the document to his attorney, who took it to the court and obtained a stay. (Lal Dep. at 11-12.) U.S. Life asserts that this is evidence that Lal's license was suspended, even if only for a few hours, before the stay was issued, and that this suspension acted to terminate the Policy.

Although the Policy terminates "upon the suspension" of Lal's medical license, the circuit court's stay acted "to preserve the status quo existing on the date of its issuance." 1 Am. Jur. 2d *Actions* § 68 (2006). *See Gilley v. United States*, 649F.2d 449, 453 (6th Cir. 1981) (noting that stays of administrative agency actions are granted by courts "to maintain the status quo" pending further review of the agency's action); *Doster v. Estes*, 126 Mich. App. 497, 508, 337 N.W.2d 549, 554 (1983) (stating that the purpose of injunctive relief is "to preserve the status quo" pending trial or administrative appeal). The status quo in injunctive procedures is the "last, uncontested status preceding commencement of the controversy." *Blaylock v. Cheker Oil Co.*, 547 F.2d 962, 965 (6th Cir. 1976) (internal

---

[1] When it rejected Lal's disability claim, U.S. Life determined that the Policy terminated on March 27, 1997, and refunded Lal for all premiums paid after that date. (Def.'s Br. in Supp. Mot. Summ. J. and in Opp. to Pl.'s Mot. Summ. J., Ex. P.)

citations omitted). The circuit court's stay was issued on March 31, 1997, and was effective immediately. The stay preserved the status quo so that Lal's license was not suspended pursuant to the Order of Summary Suspension. Therefore, because Lal's license was not suspended on March 31, 1997, the Policy did not terminate on this date.

The Board entered its Final Order suspending Lal's license for six months and a day on January 17, 2003. The Final Order stated that it would be effective 30 days later on February 16, 2003.

Apparently, on January 31, 2003, Lal sent a letter to the Department of Consumer & Industry Services, Bureau of Health Services, requesting an extension of the time in which the revocation of his license would be effective. On February 5, 2003, a manager in the Department responded to this request. This letter first summarizes the January 17 Order and then says:

> The Board of Medicine's Disciplinary Subcommittee is the only authority that can grant a request to change a Final Order's terms and conditions. Therefore, if you still wish to request the date for the suspension be extended for 30 days you need to file a request for reconsideration with the Disciplinary Subcommittee. The request for reconsideration would need to reach this office no later that (sic) 60 days from the effective date of the Final Order.

This letter says nothing about what would happen in between the effective date of the Final Order, February 16, 2003, and the 60 days during which Lal

had to file the request that the date of the suspension be extended for 30 days. On February 21, 2003, Lal filed a Motion for Reconsideration. Among the items of relief requested in the Motion for Reconsideration was that the suspension be delayed until the Motion for Reconsideration was decided. On April 22, 2003, the Board of Medicine denied the Motion for Reconsideration. The denial of the Motion for Reconsideration says nothing about the effective date of the suspension and it says nothing about a postponing the effective date of the suspension. It simply says that the request for reconsideration is denied, and "this order shall be effective on the date signed . . . ."

Lal argues that theFebruary 5 letter from the Department of Consumer & Industry Services, Bureau of Health Services, delayed his suspension. He argues that the suspension did not occur until April 22, 2003, when the Board denied his Motion for Reconsideration. Even upon a second look, this Court believes and holds that Lal's interpretation of the February 5 letter is incorrect.

First, the Court agrees that the February 5 letter is somewhat ambiguous, but it is not ambiguous as to its major point - the letter could not extend the effective date of the extension. Only the Board of Medicine's Disciplinary Subcommittee could extend the effective date of the suspension.

Second, the Final Order Denying Reconsideration states "this order shall be effective immediately." By its very terms it is referring to the Final Order Denying Reconsideration, not the January 17 Final Order, effective February 16.

Third, there is no order from the Board of Medicine Disciplinary Subcommittee delaying the effective date of the suspension.

Fourth, Lal says that his interpretation of the effective date of the suspension must be correct because he was not reinstated until October 9, 2003. But this date does not support Lal's conclusion that there was no suspension in February. If the suspension started on April 22, the suspension would have terminated, at the earliest (subject to reinstatement), on October 23, 2003, which was two weeks after Lal's reinstatement of October 9, 2003. There are other explanations for reinstatement in October that Lal has not refuted. The original January 17, 2003, Final Order, itself, says:

> . . . reinstatement of a license which has been suspended for more than six months is not automatic and, in the event Respondent applies for reinstatement of the license, application for reinstatement may be made not sooner than 90 days prior to the end of the suspension period . . . . Further, in supportof the application for reinstatement, Respondent shall supply clear and convincing evidence that Respondent is of good moral character, is able to practice medicine with reasonable skill and safety, and that it is in the public interest for Respondent to resume practice.

Without further proof from Lal in opposition to U.S. Life's motion for summary judgment, the Court would only be speculating about the reason for the reinstatement date. Considering this quoted language from the January 17, 2003, Final Order, it is not

reasonable to conclude that the end of suspension occurred six months and one day after April 22, 2003, which, as shown, it did not. There had to be at least some period of suspension that occurred prior to April 22, 2003, in order for the October 9 date to make any sense.

Finally, the Court will take judicial notice[2] of the Michigan Department of Community Health's "Verify a License/Registration" website.[3] According to that website, Lal was suspended on February 16, 2003, and reinstated on October 9, 2003.[4] Therefore, the Court finds that on February 16, 2003, Lal was suspended and his Policy terminated.

---

[2] This Court has previously determined that "[p]ublic records and government documents are generally considered not to be subject to reasonable dispute," including "public records and government documents available from reliable sources on the Internet." *See United States ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972-73 (W.D. Mich. 2003)(internal quotations omitted). Under Fed. R. Evid. 201(e) a party is entitled to an "opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." Prior notification by the court of its intention to take judicial notice is not necessary, and the party's request to be heard "may be made after judicial notice has been taken." *Id.*

[3] The website was referenced in Plaintiff's Response to Defendant's Motion for Summary Judgment Exhibit D.

[4] Lal's medical license history is available at:
http://www.cis.state.mi.us/free/publicinfo.asp?rb_name=ON&rb_facility=&l_person_id=125223&l_profession_id=43&l_license_id=125915&Last_Name=LAL&First_Name=NIRANJAN&License_number=&Facility_Name=&DBA_Name=&profession=0&offset=0

B. Whether Lal was totally disabled at the time of his suspension is a question of fact.

In order to be eligible for disability benefits under the Policy, Lal must show that he was totally disabled prior to February 16, 2003. The Policy defines "Total Disability" as:

> -prior to your 65th birthday, your complete inability to perform the substantial and material duties of your Current Occupation beyond the end of the Elimination Period;
> -on or after your 65th birthday, your complete inability to perform the substantial and material duties of any gainful job for which you are reasonably fit by training, education or experience.
> The Total Disability must be a result of an Injury or Sickness and must begin while insured under the group policy. To be considered totally disabled, you must also be under the Regular Care and Attendance of an Attending Physician.

The Policy defines "Regular Care and Attendance" as "observation and treatment to the extent necessary under existing standards of medical practice for the condition causing Disability."

Lal contends that he was totally disabled as of February 4, 2003. Lal's claim with U.S. Life asserts that this was the last day Lal was able to work and that he had first been treated for the disability on September 7, 2001. Lal also submitted to U.S. Life a letter from Dr. Anderson, his treating physician, in which she stated that Lal's disability "became active

and effective February 4, 2003." (Def.'s Br. in Supp. Mot. Summ. J. and in Opp. to Pl.'s Mot. Summ. J., Ex. L.)

Dr. Anderson stated that she considered Lal to be under her regular care. Dr. Anderson interpreted regular care to mean "regular scheduled visits that are ongoing for a length of time and that would involve evaluation and treatment." (Anderson Dep. at 74-75.) Dr. Anderson also stated that Lal had been under her regular care for treatment of the condition as early as March 2001, long before the date that the Policy terminated.

U.S. Life asserts that Lal could not have been totally disabled on February 4, 2003, because he was not under Dr. Anderson's "Regular Care and Attendance." U.S. Life cites case law but does not present evidence pertaining to the relevant medical standards of observation and treatment of Lal's condition as required under the Policy. U.S. Life argues that Lal could not be under the regular care of Dr. Anderson because he did not receive any treatment from September 2001, to March 25, 2003. Dr. Anderson admitted that because of the significant lapse in time between examinations, Lal could not have obtained a prescription renewal. (Anderson Dep. at 28.) The first time that Lal sought Dr. Anderson's care while claiming an inability to work due to his condition was March 25, 2003. Dr. Anderson admitted that her written statement to U.S. Life that Lal became disabled on February 4, 2003, was based on a comment made to her by Lal, not from her own examination. (Anderson Dep. at 37-38.)

Because Lal's date of total disability has not been shown and in light of the absence of evidence regarding the medical standards of observation and treatment for Lal's disabling condition, there is a question of fact as to whether Lal was "totally disabled" before the Policy terminated on February 16, 2003, and U.S. Life is not entitled to summary judgment.

IV. Conclusion

For the foregoing reasons, the Court finds that Lal was suspended as of February 16, 2003, and will deny the parties' motions for summary judgment.

An Oder consistent with this Opinion will be issued.

Dated: December 7, 2006

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Case No. 1:05-CV-0853

[Filed December 7, 2006]

NIRANJAN LAL, M.D.,

Plaintiff,

v.

UNITED STATES LIFE INSURANCE COMPANY,

Defendant.

HON. GORDON J. QUIST

ORDER

In accordance with the Opinion entered this date,

IT IS HEREBY ORDERED that the Court finds as a matter of law that Lal was suspended as of February 16, 2003.

IT IS FURTHER ORDERED that Plaintiff's and Defendant's motions for summary judgment (docket nos. 23, 28, and 45) are **DENIED**.

Dated: December 7, 2006

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

153

(2)

Supreme Court, U.S.
FILED
FEB - 4 2010
OFFICE OF THE CLERK

No. 09-798

In The
Supreme Court of the United States

NIRANJAN LAL,

Petitioner,

v.

UNITED STATES LIFE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

K. SCOTT HAMILTON (P44095)
Counsel of Record
DICKINSON WRIGHT PLLC
500 WOODWARD AVENUE, SUITE 4000
DETROIT, MI 48226
(313) 223-3500
Khamilton@dickinson-wright.com

Attorneys for Respondent United States Life Insurance Company

February 4, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether Petitioner has presented a compelling reason to grant the Petition where the Sixth Circuit's unpublished, non-precedential decision involved only a Michigan state law breach of contract claim, involved no federal issue, involved no constitutional question, created no split in authority among any circuit courts of appeal, and did not conflict with any opinion from this Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. INTRODUCTION 1

B. RELEVANT FACTS 1

1. Relevant Terms of the Policy 3

2. The State of Michigan Summarily Suspended Lal's Medical License in 1997 3

3. Lal's Claim for Total Disability Benefits 4

4. U.S. Life Denied Lal's Claim for Benefits 4

5. Proceedings in the District Court 5

6. The Sixth Circuit Opinion 5

REASONS FOR DENYING THE PETITION 6

A. There Is No Compelling Reason For Granting *Certiorari* 6

B. The Sixth Circuit Correctly Ruled That the Policy Automatically Terminated in March 1997 7

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

522 W. 38th St. v. New York Hotel & Motel Trades Council,
517 F. Supp. 2d 687 (S.D. N.Y. 2007) 11

ACGIE v. Marzonie,
447 Mich. 624 (1994) 9

ARA Chuckwagon v. Lobert,
69 Mich. App. 151 (1976) 14

Auto-Owners Ins. Co. v. Churchman,
440 Mich. 560 (1992) 9

Becktell v. Allstate Ins. Co.,
648 F. Supp. 977 (E.D. Mich. 1996) 9

Blaylock v. Checker Oil Co.,
547 F.2d 962 (6th Cir. 1976) 13

Heniser v. Frankenmuth Mut. Ins. Co.,
449 Mich. 155 (1995) 7, 9

Herron v. Keene Corp.,
751 F.2d 873 (6th Cir. 1984) 14

Illinois Employers Ins. of Wausau v. Dragovich,
139 Mich. App. 502 (1984) 9

J.O. ex rel. C.O. v. Orange Tp. Bd of Educ.,
289 F.3d 267 (3rd Cir. 2002) 11

Lehr v. Professional Underwriters,
296 Mich. 693 (1941) 9

Nabozny v. Burkhardt,
461 Mich. 471 (1991) 8

Overton v. Ohio,
534 U.S. 982 (2001) 6

Reed v. Rhodes,
472 F. Supp. 603 (N.D. Ohio 1979) 14

Reznick v. Provident Life & Acc. Ins. Co.,
364 F. Supp. 2d 635 (E.D. Mich. 2005), *aff'd* 181
Fed. Appx. 531 (6th Cir. 2006) 7, 8

Ross v. Moffitt,
417 U.S. 600 (1974) 6

Trierweiler v. Frankenmuth Mut. Ins. Co.,
216 Mich. App. 653 (1996) 9

U.S. Fid. & Guaranty Co. v. Star Fire Coals, Inc.,
856 F.2d. 31 (6th Cir. 1988) 9

Other Authorities

Black's Law Dictionary 13

Rules

6th Cir. L.R. 206(c) 1
MCR 2.615(A)(2) 14
MCR 3.310(C)(4) 14
Sup. Ct. R. 10 1

STATEMENT OF THE CASE

A. INTRODUCTION

The decision below is unreported and is not binding on any court, including subsequent panels within the Sixth Circuit. 6th Cir. L.R. 206(c) (noting that only "[r]eported panel opinions are binding on subsequent panels"). It involved only a state law claim for breach of contract. The decision does not conflict with a decision of this Court, nor does it create any split of authority among circuit courts of appeal that requires this Court's resolution. It presents no federal or constitutional issue. The issue sought to be reviewed is peculiar, unique, fact-specific and exceedingly narrow - - i.e., whether an injunction staying enforcement of a state medical board's order suspending a doctor's license precludes the automatic termination of a disability income insurance policy where the policy unambiguously says that coverage ends "upon the suspension or revocation in any state of [Petitioner's] license to practice medicine". Lastly, the Sixth Circuit's decision was correct.

Petitioner simply cannot meet his burden of demonstrating any "compelling reasons" for the Petition to be granted. Sup. Ct. R. 10.

B. RELEVANT FACTS

Petitioner Niranjan Lal ("Lal") sued Respondent United States Life Insurance Company ("U.S. Life") alleging that U.S. Life wrongfully denied his claim for disability income insurance benefits under a policy (the "Policy") which pays a monthly benefit if he is

"disabled," meaning that he is unable to perform the material duties of his occupation as a physician, and that he is receiving regular care for the condition causing the disability. Lal claimed that he was disabled as a result of pancreatitis. U.S. Life denied his claim, concluding that the Policy automatically terminated by its terms when the State of Michigan suspended Lal's license to practice medicine by order of March 27, 1997, and Lal did not claim to have become disabled until 2003. Michigan suspended Lal's medical license based upon allegations (later proven true) that he illegally prescribed Vicodin.

On July 14, 2006, U.S. Life moved for summary judgment on the basis that Lal's alleged disability began long after the Policy terminated in March, 1997, and the district court denied that motion by Opinion and Order of December 7, 2006.

The case was tried to the bench on June 5 and 6, 2007. The district court found in favor of Lal, holding that Lal satisfied the Policy's definition of "disability" as of February, 2003. U.S. Life timely appealed to United States Court of Appeals for the Sixth Circuit.

By an unpublished opinion of September 3, 2009, the Sixth Circuit reversed, holding that coverage ended as a matter of law on March 27, 1997 based upon the policy's unambiguous provision that it would "end . . . upon the suspension or revocation in any state of your license to practice medicine," and because it was undisputed that on March 27, 1997 the Michigan Department of Consumer and Industry Services, Board of Medicine and Disciplinary

Subcommittee summarily suspended his medical license.

1. Relevant Terms of the Policy

The Policy expressly states: "Your insurance will end **upon the suspension or revocation in any state of your license to practice medicine** as a result of a criminal act, ethical violation, or gross malpractice."

2. The State of Michigan Summarily Suspended Lal's Medical License in 1997

On March 27, 1997 the Department of Attorney General, Health Professionals Division, on behalf of the Michigan Department of Consumer & Industry Services, Office of Health Services Board of Medicine Disciplinary Subcommittee (the "State Medical Board") entered an Order of Summary Suspension of Lal's medical license which was effective "commencing the date this order is served upon Respondent." Lal received the Order on March 31, 1997 and immediately contacted an attorney, who filed a petition in a Michigan state court requesting that the Order be stayed. An Ex-Parte Order Staying the Order of Summary Suspension was entered the afternoon of March 31, 1997.

The criminal proceedings against Lal went forward, and on March 17, 1999, a jury convicted Lal of the drug charges that ensued from the same investigation that lead to his licensing suspension. As with his suspension, Lal did not inform U.S. Life of his criminal conviction.

The Disciplinary Subcommittee entered a Final Order of Suspension on January 17, 2003. Again, Lal did not inform U.S. Life of that order.

3. Lal's Claim for Total Disability Benefits

Despite the fact that his license had been suspended by the State of Michigan in March, 1997, causing the Policy to terminate automatically by its terms, Lal submitted a claim to U.S. Life for total disability benefits on September 5, 2003, some 7 months after he claimed to have become disabled. According to the claim form, on February 4, 2003, Dr. Lal was totally disabled by chronic pancreatitis, a health condition that he had suffered from since childhood, and with which he had managed to practice medicine during the entire span of his medical career. Lal's September 5, 2003 claim stated that his disability allegedly began on February 4, 2003 – eighteen days after the Final Order of Suspension was entered and twelve days before its effective date.

4. U.S. Life Denied Lal's Claim for Benefits

After Lal filed his claim for benefits, U.S. Life finally learned of the disciplinary actions taken against Lal by the State of Michigan, including both of his medical license suspensions, as part of a routine claim investigation. U.S. Life immediately notified Lal that his insurance coverage was terminated. U.S. Life determined that, under the terms of the Policy, Lal's insurance was cancelled effective March 27, 1997. Lal then commenced the underlying lawsuit.

5. Proceedings in the District Court

U.S. Life filed a Motion for Summary Judgment on July 14, 2006, seeking judgment that Dr. Lal was not entitled to any disability benefits because (1) as a matter of law, the Policy terminated automatically upon service of the Order of Summary Suspension on March 31, 1997, prior to the date of disability, or (2) as a matter of law, the Policy terminated upon entry of the Final Order of Suspension on January 17, 2003, prior to the date of disability, or (3) Lal could not be considered "totally disabled" under the Policy because he was not under the regular care and attendance of a physician prior to his license suspension.

The district court denied U.S. Life's Motion, finding among other things there was a question of fact as to whether Lal was "totally disabled" before the Policy terminated. In denying U.S. Life's motion, the district court held that Lal's license was suspended on February 16, 2003, and the Policy terminated on that date.

The matter proceeded to a bench trial and the district court issued its Opinion on July 12, 2007, finding in favor of Lal. U.S. Life timely appealed.

6. The Sixth Circuit Opinion

On September 3, 2009, the Sixth Circuit reversed the district court in an unpublished, unreported opinion. The Sixth Circuit held that the "unambiguous language of the contract said that Lal's contract terminated once his license was suspended for ethical violations," and that "[n]othing in the language

suggests that an extremely short period of suspension is not sufficient to trigger termination" (9/3/09 Opinion at 6a). The Sixth Circuit concluded that "[b]ecause coverage terminated once the state suspended Lal's license, the district court should have granted summary judgment to U.S. Life. . ." . (*Id.* at 7a).

REASONS FOR DENYING THE PETITION

A. There Is No Compelling Reason For Granting *Certiorari*

Petitioner's only argument for reviewing the unpublished Sixth Circuit opinion is that "[c]ertiorari should be granted in this matter to correct" a legal error "which adversely affects" his "material rights." Petition for Writ of *Certiorari* at 7. Correcting alleged errors, especially alleged errors in unpublished opinions, is simply not a compelling reason for granting the Petition. *See Overton v. Ohio*, 534 U.S. 982, 985-86 (2001) ("we cannot act as a court of simple error correction and . . . the unpublished intermediate court decision below lacks significant value as precedent") (Breyer, J., for Stevens, O'Connor, and Suter, J. J., regarding denial of *certiorari*"). *See also Ross v. Moffitt*, 417 U.S. 600, 617-18 (1974) ("[t]his Court's review is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review").

B. The Sixth Circuit Correctly Ruled That the Policy Automatically Terminated in March 1997

In addition to Lal's wholesale failure to demonstrate any compelling reason to grant the Petition, the writ should also be denied because the Sixth Circuit's holding was correct.

The U.S. Life Policy specifically provides that "Your insurance will end . . . upon the suspension or revocation in any state of your license to practice medicine as a result of a criminal act, ethical violation or gross malpractice . . . ." By Order of March 27, 1997, the Department of Consumer and Industry Services, Board of Medicine and Disciplinary Subcommittee suspended Lal's medical license "commencing the date this Order is served upon" him, which was March 31, 1997. The Sixth Circuit correctly applied the unambiguous policy terms to the undisputed facts and properly concluded that the Policy terminated upon suspension of Lal's license, regardless of any subsequent state court stay order.

First, the Policy language is unambiguous in stating that the Policy terminates upon suspension of an insured's medical license. It is well-established that "courts are bound by the specific language set forth in [insurance] agreements," *Heniser v. Frankenmuth Mut. Ins. Co.*, 449 Mich. 155, 160 (1995), and "an insurance policy must be enforced in accordance with its terms." *Reznick v. Provident Life & Acc. Ins. Co.*, 364 F. Supp. 2d 635, 637 (E.D. Mich. 2005), *aff'd* 181 Fed. Appx. 531 (6th Cir. 2006). Moreover, "[i]f there is no ambiguity in the Policy, the Court will 'enforce the

terms of the contract as written.'" *Reznick, supra*, 364 F. Supp. 2d at 637 (quoting *Nabozny v. Burkhardt*, 461 Mich. 471, 477 (1991)).

The Policy is plain and unambiguous in stating that it terminates upon suspension of an insured's medical license. The Policy does not state that there is any minimal duration of suspension before termination occurs, nor does it indicate that the license suspension must be permanent, final, or that the termination of the Policy is void if a license suspension is stayed or reversed as the result of administrative action, appeal or otherwise. It was of course undisputed (and indisputable) that Lal's license was suspended effective March 31, 1997. Applying the Policy's unambiguous terms, the Policy terminated as a matter of law, regardless of Lal's subsequent efforts to obtain a stay of the suspension.

The Policy does not say that it terminates "upon **final** suspension" of the insured's medical license, or "upon suspension **after exhaustion of any appellate review**." Nor does it say that the Policy terminates "upon suspension of your medical license, **unless a court stays or enjoins the order of suspension**." The Policy also does not say that it terminates "upon the suspension of your medical license, **provided that it remains suspended for a certain minimum period of time**." The Policy says simply and unambiguously that it terminates "upon the suspension or revocation in any state of your license to practice medicine. . . ." Lal can only justify the result he seeks by adding words to the Policy that it does not contain, and by ignoring the unambiguous terms that it uses.

As an insurer, U.S. Life is free to limit the scope of policy coverage and the kinds of risk for which it will extend benefits. *Heniser v. Frankenmuth Mut. Ins. Co.*, 449 Mich. 155, 161 (1995) ("[a]n insurer is free to define or limit the scope of coverage"). A court is not permitted to construe an insurance policy in such a way that expands the scope of policy coverage to include risks or losses that are not covered by the terms of the policy. *Becktell v. Allstate Ins. Co.*, 648 F. Supp. 977, 979-80 (E.D. Mich. 1996) ("The parties to any insurance policy are permitted to enlarge or circumscribe insurance liability risks as they desire .... This Court is not empowered to rewrite the policy in order to award benefits to an aggrieved insured."); *U.S. Fid. & Guaranty Co. v. Star Fire Coals, Inc.*, 856 F.2d. 31, 33 (6th Cir. 1988) ("[t]he court must give all terms their plain meanings and not rewrite an insurance contract to enlarge the risk"); *Auto-Owners Ins. Co. v. Churchman*, 440 Mich. 560, 567 (1992) ("[i]t is impossible to hold an insurance company liable for a risk it did not assume"); *Trierweiler v. Frankenmuth Mut. Ins. Co.*, 216 Mich. App. 653, 657 (1996) ("[a]n insurance company should not be held liable for a risk it did not assume"); *Illinois Employers Ins. of Wausau v. Dragovich*, 139 Mich. App. 502, 507-08 (1984) ("[A]n insurance company may not be held liable for a risk it did not assume. ... Plaintiff clearly limited its liability under the policy provision at issue, and we cannot alter or rewrite the parties' contract."); *Lehr v. Professional Underwriters*, 296 Mich. 693, 696-97 (1941) ("[A]n insurance company may limit the risks it assumes and fix its premiums accordingly.... The liability was limited in the policy. To hold otherwise would be to write a new contract for the parties."). The Michigan Supreme Court declared in *ACGIE v.*

Marzonie, 447 Mich. 624, 631 (1994), that "this Court will not countenance holding 'an insurance company liable for a risk it did not assume'."

In the present case, Lal is attempting to add to the Policy terms that do not exist in it, and thereby expand the scope of coverage beyond that to which U.S. Life agreed. The Policy insured Lal unless his medical license became suspended, which undisputedly occurred in March 1997. The Policy limited U.S. Life's coverage by expressly terminating insurance if a state agency determined that his license should be suspended. U.S. Life did not agree to provide coverage if an insured's license is suspended, but is later reinstated for some reason (e.g., by a finding that the insured did not commit the alleged misconduct, or by order of a court).

Second, the state court's stay order did not "preserve the status quo." To the contrary, the "status quo" as it existed before Lal commenced the state court action to obtain the stay was that his license was suspended.

As the Sixth Circuit recognized, the district court was simply wrong in holding that the state court's stay order merely maintained the *status quo* and kept Lal's license in place, uninterrupted by the state's suspension order. The state court's stay order **affirmatively altered** the legal relationship of the parties that were before it, and **changed** the status of Lal's medical license and his ability to practice. When Lal filed the state action and walked into court *ex parte* to obtain a stay on March 31, 1997, he was a physician whose license had been suspended by the

State of Michigan and who could not legally practice medicine. The state court, in issuing the stay, affirmatively altered his status as it existed when he commenced the action. An order which alters or changes the legal relationship of the parties before it alters or changes (as opposed to preserves) the *status quo*. *See J.O. ex rel. C.O. v. Orange Tp. Bd of Educ.*, 289 F.3d 267, 273 (3rd Cir. 2002) (observing that TRO "did not . . . alter the legal relationship between the parties, but only preserved the status quo").

In contexts similar to the present action, stay orders that disrupt pending proceedings are deemed to alter, not preserve, the *status quo*. For example, in *522 W. 38th St. v. New York Hotel & Motel Trades Council*, 517 F. Supp. 2d 687 (S.D. N.Y. 2007), the plaintiff sought an order staying arbitration of a matter after the arbitration began. The court refused to do so, holding that "granting an injunction would in effect disrupt the arbitration and alter the status quo." *Id.* at 688.

Similarly, in the present case the state court's March 31, 1997 order staying the license suspension – which suspension was in place as of March 27, 1997 – disrupted the state licensing board's disposition and altered the *status quo*.[1]

---

[1] The district court's reasoning may have been proper if Lal had obtained a stay of the state licensing board's proceedings **before** the board issued its order of suspension. In that case, such a stay would have preserved the status quo because Lal's license would never have been suspended. But the undisputed facts are that the State of Michigan **did** suspend Lal's medical license, and the state

If Lal had never obtained an injunction staying the order of suspension, the Policy clearly would have terminated in March, 1997. If Lal had waited one month before obtaining an injunction the Policy again clearly would have terminated by its own terms because there is no provision saying that it "un-terminates" once a suspension is lifted or stayed. The same would hold true if Lal had waited one week or one day after being suspended before obtaining an injunction. Nor could it make any logical difference if Lal obtained an injunction the same day he received the order of suspension, for there was unquestionably a period of time during which his license to practice medicine was indisputably suspended by the State of Michigan and not subject to the state court's stay order. The Sixth Circuit correctly recognized that whether that period is one month, one week, one day or one hour is irrelevant, and Lal provides no principled, reasoned explanation why obtaining a stay soon after the suspension order was issued and served means that the Policy did not terminate by its unambiguous terms.

Lal is also wrong in asserting that the "status quo" with respect to the state court injunction should be viewed as the circumstances that existed before the March 27, 1997 suspension order because having a valid medical license was the last uncontested status preceding commencement of the controversy. (Petition at 6). The "status quo" is whatever set of circumstances exist at the time the action seeking

---

court injunction altered the status of Lal's license and **changed** the *status quo*.

injunctive relief is commenced, not when the parties were last "at peace" with one another as Lal asserts. *Blaylock v. Checker Oil Co.*, 547 F.2d 962, 965 (6th Cir. 1976) (reversing injunction because "the district court went far beyond freezing the parties in their positions *at the time this action was commenced*").

At the time Lal commenced his state court action to stay the suspension order, the "status quo" was that the State of Michigan had suspended his medical license. The relief he sought (and which the state court granted), was an affirmative, mandatory injunction to **change** the *status quo* by enjoining the suspension order's enforcement.

In short, the "status quo" is the state of affairs that immediately precedes commencement of an action to obtain an injunction. If the injunction **preserves** the *status quo*, it is a "prohibitory" injunction; if it changes or alters the *status quo*, it is an "affirmative" or "mandatory" injunction. The state court altered the *status quo* by changing Lal's legal status from being a doctor with a suspended license to one who could practice medicine.

Third, by definition, a "stay" does not alter or void the matter that is stayed. Thus, the legal effect of the stay was not to "undo" the suspension order. In defining a stay, *Black's Law Dictionary* provides:

> A "stay" does not reverse, annul, undo or suspend what already has been done . . . but merely suspends the time for performance of the particular mandates stayed . . . .

See also, Herron v. Keene Corp., 751 F.2d 873, 875 (6th Cir. 1984) ("[t]he effect of a stay is simply to delay" what is stayed, but "[i]t does not affect the substantive rights and duties of the litigants"); *Reed v. Rhodes*, 472 F. Supp. 603, 605 (N.D. Ohio 1979) ("[a] stay does not reverse, annul, undo or suspend what has already been done . . . [n]or does a stay impair the force, or pass on the merits the orders [subject to a stay]").

Although the state court's stay order permitted Lal to continue to practice medicine, it did not void, reverse, or undo the fact that the State Medical Board suspended Lal's medical license in March, 1997, and the fact of that suspension is all that the Policy's unambiguous terms require for it to automatically terminate. It is the **fact** of suspension by the State Medical Board, not subsequent judicial remedies designed to stay the state agency's enforcement of that suspension, that is relevant with respect to the unambiguous terms of Policy.

Fourth, the Suspension Order was not immediately stayed when the circuit court entered the stay order. The stay order was an injunction prohibiting enforcement of the suspension order. Under Michigan state rules of procedure, although injunctions are not subject to the automatic 21 day stay like other judgments and "may be enforced immediately" under MCR 2.615(A)(2), nonetheless "notice of an injunction . . . is requisite to the enforcement of an injunction." *ARA Chuckwagon v. Lobert*, 69 Mich. App. 151, 163 (1976). See also MCR 3.310(C)(4) (injunction "binding only on the parties to the action . . . who receive actual notice of the order by personal service or otherwise"). The March 31, 1997 stay order was received by the

Medical Board on April 1, 1997. Thus, it was not enforceable until the day after it was issued, rather than having "immediate" effect.

CONCLUSION

Petitioner Lal cannot establish any compelling reason for granting his Petition, and it should therefore be denied.

Respectfully submitted,

K. Scott Hamilton (P44095)
Counsel of Record
DICKINSON WRIGHT PLLC
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500
Khamilton@dickinson-wright.com

Attorneys for Respondent United States Life Insurance Company